

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer  
Marshall Johnson  
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Phyllis A. Reha  
Gregory Scott

Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner

In the Matter of the Complaint of Desktop  
Media, Inc. Against Qwest Corporation  
Regarding Interconnection Terms

ISSUE DATE: October 2, 2003

DOCKET NO. P-421/C-02-1597

ORDER ADOPTING ALJ'S REPORT WITH  
MODIFICATIONS AND REMANDING TO  
OAH FOR FURTHER PROCEEDINGS

**PROCEDURAL HISTORY**

On December 15, 2000, the Commission approved the interconnection agreement (ICA) between Desktop Media, Inc.(Desktop) and Qwest Corporation (Qwest) in Docket No. P-5934,421/IC-00-1509. Desktop opted into the AT&T-U S West Interconnection Agreement.

On September 24, 2002, Desktop filed a complaint against Qwest pursuant to Minn. Stat. § 237.462. The complaint alleged that Qwest violated the terms of the Interconnection Agreement (ICA) with Desktop, thus hindering Desktop's ability to compete in the market.

On October 10, 2002, Qwest filed its answer.

On October 28, 2002, the Commission referred this matter to the Office of Administrative Hearings for a contested case proceeding. Administrative Law Judge (ALJ) Richard C. Luis was assigned to the case.

On June 24, 2003, the ALJ submitted his Findings of Fact, Conclusions of Law, and Recommendation in this matter.

On July 11, 14, and 15, 2003, exceptions to the ALJ's report were filed by the Department of Commerce (DOC), Qwest, and Desktop, respectively.

On July 24 and 25, and 28, 2003, replies to the exceptions were filed by the DOC, Qwest, and Desktop, respectively.

This matter came before the Commission on August 19, 2003, when the record closed under Minn.Stat. § 14.61, Subd.2.

## **FINDINGS AND CONCLUSIONS**

### **I. Summary of Desktop's Complaint**

Desktop alleged that Qwest has:

- improperly failed to provide Desktop with Unbundled Local Switching (UBS) in a timely manner;
- interfered with the ability of customers who use MSN Broadband as their digital subscriber line (DSL) provider to switch to plain old telephone service (POTS) provided by Desktop;
- refused to provide Desktop with the features of its switch (particularly including a feature known as "MSDI," which allows a voice mail provider to activate a message waiting indicator on any line throughout Qwest's SS7 network using a single trunk);
- refused to provision dark fiber.

Desktop requested the Commission grant it the following relief:

- declare that Qwest has breached the ICA;
- require Qwest to provision Desktop with Unbundled Local Switching in a manner that meets Desktop's needs;
- award Desktop direct measures of quality (DMOQ) credits based on Qwest's refusal to provision Unbundled Local Switching;
- require Qwest to implement efficient processes to enable customers who receive MSN Broadband DSL service to change local service providers without an unreasonable interruption in service;
- require Qwest to provide Desktop with the MSDI feature on an unbundled basis;
- require Qwest to provision dark fiber in response to Desktop's request for fiber between the Red Wing and Winona central offices.

The ALJ considered each of the above matters: UBS, Customer Migration, Simple Message Device Interface Access, Dark Fiber, Direct Measures of Quality (DMOQs) and other damages. Each will be discussed in turn.

### **II. The ALJ's Conclusions and Recommendations**

#### **A. The ALJ's Conclusions**

The ALJ came to the following conclusions:

- Qwest had an obligation under the ICA to provide UBS to Desktop in a reasonable manner. Qwest failed to provide ordering instructions for the UBS Desktop sought from Qwest. That failure for the periods of 110 days for UBS and 93 days for Primary Rate Interface (PRI) is unreasonable.
- Qwest had an obligation under the ICA to provide SMDI<sup>1</sup> to Desktop as a unbundled network element (UNE). Qwest failed to provide SMDI as an unbundled element when first requested by Desktop. Qwest has an ongoing obligation to provide switch features as UNEs, where such features are installed. Switch features are not removed from Qwest's unbundling obligation when such features are part of Qwest's tariffed MDS or MDSI products.<sup>2</sup>
- Qwest's processes regarding migration, where the end user customer service record (CSR) has a notation indicating internet services are being received from a volume internet service provider (VISP), have the effect of impairing Desktop's ability to compete as a competitive local exchange carrier (CLEC) of POTS to customers. Qwest's use of these processes is a violation of Qwest's duty to provide interconnection on rates, terms, and conditions that are just, reasonable and nondiscriminatory, as required by 47 U.S.C. § 251(c)(2)(D). Desktop is entitled to forward-looking relief from Qwest's continued restrictions on customer migration where a VISP notation is present on the end user's CSR.
- Qwest had an obligation under the ICA to provide dark fiber for Desktop in a reasonable manner. Qwest failed to process one order for dark fiber in accordance with the terms of the ICA. Since that particular order crossed a local access transport area (LATA) boundary, however, the *force majeure* provision of the ICA operates to relieve Qwest of its obligation to provide the ordered dark fiber on that route.
- Minn. Stat. § 237.462, subd.1 authorizes the Commission to issue an order administratively assessing monetary penalties for knowing and intentional violations of certain statutes or an approved interconnection agreement. While there have been knowing and intentional violations of the ICA, there is no factual basis in this record to determine what monetary penalties are appropriate.
- In order to determine an appropriate monetary penalty, evidence as to Desktop's actual damages resulting from Qwest's failure to comply with the terms of the ICA is needed.

ALJ's Conclusions of Law ¶¶ 5-10.

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<sup>1</sup> For consistency, SDMI was changed herein to SMDI (Simple Message Device Interface).

<sup>2</sup> Qwest referred to the SDMI feature as MSD and MSD-Interoffice (MSDI).

## **B. The ALJ's Recommendations**

The ALJ recommended that the Commission, among other things:

- require that Qwest comply with the ICA to make ordering information for UBS available to CLECs on a timely basis;
- prohibit Qwest from discriminating against CLECs in the handling of customer migration where Qwest records show a relationship with a volume internet service provider;
- require that Qwest provide simple message device indicator ports as a UNE in accordance with the parties' interconnection agreement;
- deny Desktop's Complaint regarding Qwest's failure to provision dark fiber under the parties' interconnection agreement;
- deny Desktop's request for credits under the ICA provisions for DMOQ's;
- remand this matter to the Office of Administrative Hearings for further proceedings, to determine damages suffered by Desktop through Qwest's failure to comply with the ICA regarding unbundled switching and Qwest's discrimination in customer migration, for the assessment of an appropriate penalty under Minn. Stat. § 237.462.

ALJ's Recommendations ¶¶ 2-7.

## **C. Commission Action**

Having reviewed the record and provided parties with an opportunity to be heard, the Commission finds the analysis of the ALJ persuasive. Therefore, the Commission will accept, adopt and incorporate herein the ALJ's Findings of Fact, Conclusions of Law and Recommendations, with the modifications discussed below.

## **III. Unbundled Local Switching**

### **A. Findings and Conclusions of the ALJ**

The ALJ found that Qwest's failure to provide ordering information to Desktop in a timely manner was a willful violation of the ICA. The ALJ concluded that Qwest had an obligation under the ICA to provide UBS to Desktop in a reasonable manner.

The ALJ found that Desktop demonstrated that Qwest failed to provide accurate ordering information in violation of the ICA from June 6, 2002 to September 23, 2002 for analog UBS, and from June 6, 2002 to September 6, 2002 for primary rate interface (PRI). These periods of 110

days for analog UBS and 93 days for PRI were time that Desktop could have been serving customers and represent lost opportunities to compete. The failure to provide ordering information for these periods was unreasonable. The ALJ found that Qwest's failure to provide ordering information to a CLEC in a timely manner was a willful violation of the terms of the ICA.

The ALJ recommended that the Commission order Qwest to comply with the ICA and make ordering information for UBS available to CLECs on a timely basis.

However, the ALJ recommended that the Commission deny Desktop's request for credits for Qwest's preordering noncompliance under the ICA provisions for direct measures of quality (DMOQs). This will be more fully discussed in Section VI herein.

## **B. Qwest's Position**

Qwest argued that the record does not support a finding of a willful violation of the ICA. It argued that there was no finding that Qwest failed to meet provisioning deadlines. Rather, Qwest argued that it was being criticized for pre-ordering delays.

Qwest argued that it took steps to expedite the pre-ordering process, that it provided information about UBS and information necessary for orders on its website, which was accessible to any CLEC. Further, it argued that the issues that accounted for the timing of Desktop's original order for analog UBS and for PRI UBS were not attributable to ordering instructions. Rather, the issues concerned the pre-order process.

Qwest argued that at most this was a situation where Qwest had difficulty helping Desktop place its order. Qwest argued that no Minnesota CLEC has ever previously ordered UBS from Qwest, and a certain amount of confusion occurred because of this. However, Qwest argued that it promptly took action to dispel any confusion.

Qwest argued that there was no basis for concluding that Desktop should have been able to place an order on June 6, 2002. This was merely the first date on which Qwest understood Desktop had an interest in ordering UBS. The date that Desktop began the process of obtaining UBS was the date it submitted its updated questionnaire, indicating its desire to obtain UBS. Even then, Desktop could not place an order because Qwest had to load the UBS functionality on the system before it could accept orders. This was completed in mid to late August, which Qwest argued was well within the 30-45 days promised by Qwest. It was Qwest's position that any ordering delay subsequent to this was caused, at least in part, by Desktop.

## **C. The DOC's Position**

The DOC recommended that the ALJ's report on this issue be adopted. It agreed with the ALJ that it was not reasonable for Qwest not to disclose how a CLEC can order the UNEs needed by the CLEC to provide local service.

The DOC indicated that in ¶24 of the ALJ's report the dates of September 6 and September 23 appear to have been inadvertently switched. It recommended that the words "Analog" and "PRI" should be interchanged to correct this error. With this change, ¶24 would read as follows:

Desktop and the Department maintain that the period of noncompliance extends to the date that Qwest made the ordered features available. Assuming that Qwest's ordering process was functioning correctly, some time would elapse between an accepted order and providing the feature. Therefore, Qwest's failure to afford ordering instructions ends with the acceptance of an order that can be filled, or with an order properly rejected. For ~~PRI~~ Analog, the order was accepted on September 23, 2002. For ~~Analog~~ PRI UBS, Qwest had the proper forms available for Desktop's resubmitted order on September 6, 2002. That order was rejected due to errors by Desktop. A final resubmitted order was accepted as complete on September 19, 2002. For ~~Analog~~ PRI UBS, the period of Qwest's noncompliance ended on September 6, 2002.

The DOC supported this change by referencing ¶s 16, 18 and 25 of the ALJ's report which set out the correct dates of September 23, 2002 for analog UBS and September 6, 2002 for PRI UBS.

#### **D. Desktop's Position**

Desktop agreed with ALJ's findings that Qwest willfully breached the ICA as a result of delays in provisioning unbundled local switching.

#### **E. Commission Action on UBS**

The Commission concurs in the analysis of the ALJ and will adopt the ALJ's report in its entirety in respect to this issue, with the modification to ¶24, as proposed by the DOC and except with respect to DMOQ credits, which will be addressed in Section VI, below.

The Commission finds that the evidence supports the finding that Qwest willfully violated the terms of the ICA by delaying the provisioning of UBS to Desktop. The Commission will require Qwest to comply with the ICA to make ordering information for UBS available to CLECs on a timely basis.

### **IV. Migration of Customers to Desktop**

#### **A. Findings and Conclusions of the ALJ**

The ALJ concluded that Qwest's processes (i.e., coding certain customer accounts) regarding the migration of voice service of customers who were receiving either dial-up or DSL service from a volume internet service provider (VISIP) had the effect of impairing Desktop's ability to compete. The ALJ found that Qwest's use of these processes improperly interfered with Desktop's ability to

provide local service to such customers and was a violation of Qwest's duty under the federal Telecommunications Act<sup>3</sup> to provide interconnection on rates, terms, and conditions that are just, reasonable and nondiscriminatory.

Further, the ALJ found that Qwest's restrictions on migration acted as a barrier to competition and there were no technical reasons for the restrictions.

The ALJ recommended that Qwest should be prohibited from discriminating against CLECs in the handling of customer migration where Qwest records show a relationship with a VISIP.

In response to Qwest's argument that the Commission did not have jurisdiction in this matter, the ALJ found that the Commission did have jurisdiction pursuant to the ICA.<sup>4</sup> Further, the ALJ found that Minnesota Statutes<sup>5</sup> expressly authorize the Commission to address telephone service practices that are "in any respect unreasonable, insufficient, or unjustly discriminatory."

In response to Qwest's argument that Desktop's objections are moot, the ALJ found that although Qwest described its review of the handling of VISIP DSL access, the issue was not moot because there was no assured solution of the matter.

## **B. Qwest's Position**

Qwest argued that the Commission did not have jurisdiction to consider this matter because Desktop's complaints were preempted by federal law. It argued that DSL Internet access services provided by incumbent local exchange carriers (ILECS) were required to be tariffed at the FCC and that Congress has fully occupied the field of regulation of interstate telecommunications services.

Qwest also argued that the Commission could avoid the jurisdictional issue by noting the steps that Qwest has taken to eliminate the need for any further consideration of Desktop's complaints. Specifically, Qwest argued that Desktop's complaints about the migration of dial-up customers have already been resolved and Qwest is well on the way to resolving the issue as it pertains to DSL customers. For this reason, Qwest argued that no order requiring it to change its practices regarding dial-up or DSL migration was necessary.

At hearing, Qwest indicated that August 4, 2003 was the effective date of the process change implemented by Qwest to resolve this issue.

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<sup>3</sup> Federal Telecommunications Act of 1996, Pub.L.No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of Title 47, United States Code).

<sup>4</sup> 47 U.S.C. § 252(e)(3).

<sup>5</sup> Minn. Stat. § 237.081, subd.4.

### **C. DOC's Position**

The DOC recommended the adoption of the ALJ's position. It agreed that the migration problem has not been permanently solved and was not moot.

In response to Qwest's jurisdiction argument, the DOC argued that Desktop's complaint did not seek regulatory action by the Commission with respect to DSL Internet service. Rather, the complaint requested that Qwest stop its current practice of coding certain accounts and using that code as a rationale for refusing to provision UNEs and to migrate the customers voice line to a competitor. The DOC argued that it is irrelevant to Desktop's complaint that Qwest's coding practice involved some customers who subscribed to DSL Internet Service Provider services.

### **D. Desktop's Position**

Desktop agreed with the ALJ's conclusions in this matter. Desktop argued that although Qwest claimed to have taken steps that would eliminate the need to further consider the issue, all Qwest has done was to promise that steps will be taken in the future.

### **E. Commission Action with Respect to Migration of Customers**

The Commission is in agreement with the findings and conclusions of the ALJ on the issue of customer migration. The Commission will specifically prohibit Qwest from discriminating against Desktop and other CLECs in the handling of customer migration.

The Commission recognizes that Qwest has indicated that it has modified its practices to eliminate the issues described by Desktop related to customer migration. The Commission will require that Qwest submit a compliance filing within 30 days of this Order indicating how it has modified its practices to eliminate the customer migration issues described by Desktop.

## **V. Simple Message Device Interface Access**

### **A. ALJ's Findings and Conclusions**

The ALJ found that the switch features of Qwest's Message Delivery Service-Interoffice (MDSI) were available as UNEs under the terms of the ICA. The ALJ found that the ICA expressly referenced the availability of Simple Message Device Interface (SMDI) as a UNE for provision of a CLEC's "voice mail and messaging services." All of the terms needed to allow for SDMI access were found in the ICA.

The ALJ found that the switching feature known as SMDI was the feature of the central office switch that allows a voice recording unit (VRU) to indicate that a message is waiting on a voicemail system. The message indicator can be in the form of a light attached to the telephone which is activated when there is a message or can be a stutter tone which is heard when the receiver is lifted.



The ALJ also found that switch features were not removed from Qwest's unbundling obligation when such features were part of Qwest's tariffed Message Delivery Service (MDS) or Message Delivery Service-Interoffice (MDSI) products.

However, the ALJ also found that the provision of these switch features was only required where the features were installed. The ALJ found that the law was clear that Qwest was not obligated to upgrade its network to afford a CLEC access to a switch feature that was not currently installed.<sup>6</sup>

Finally, the ALJ found that the CLEC must pay for the dedicated and common transport portions of MDS and MDSI (where provided) under the terms of the ICA.

The ALJ recommended that the Commission require that Qwest provide simple message device indicator ports as a UNE in accordance with the parties' ICA.

## **B. Position of Qwest**

Qwest argued that the sole purpose of MDS and MDSI was to provide voice mail services. It argued that the Commission has held that voice mail services are not telecommunications services, subject to the ICA.<sup>7</sup> Rather, Qwest argued that these services were offered pursuant to tariffs and were not subject to the avoided cost wholesale discount.

Further, it argued that MDS and MDSI are not used for telecommunications service. They are classified by the FCC as enhanced services and the ICA should be interpreted in light of the FCC distinction between basic service/telecommunications service and enhanced service/information service.

Further, Qwest argued that neither MDS nor MDSI is a feature, function, or capability of a switch. Both MDS and MDSI require more than just the switch to provide a voice recording unit (VRU) with the capability to control the message waiting indication feature associated with voice mail. They require modems at Qwest's premises and at the customer's premises as well as translators to allow the data to be recognizable to the switch. MDS and MDSI are the products that allow the VRU to control and manipulate the switch features.

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<sup>6</sup> The ALJ cited *Iowa Utils. Bd. v FCC*, 120 F.3d 753 (8<sup>th</sup> Cir, 1997), aff'd in part, rev'd on other grounds, sub nom, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

<sup>7</sup> See *In the Matter of the Federal Court Remand of Issues Proceeding from the Interconnection Agreement between US WEST Communications, Inc. and AT&T, MCI, MFS and AT&T Wireless*, Docket No. P-421/CI-99-786, Order After Remand, issued March 14, 2000. The Commission issued this *Order After Remand* pursuant to a remand order issued by the Federal District Court in *US West Communications Ind. v. MPUC, et. al*, Civ. 97-913, slip. Op. (D. Minn. March 30, 1999) (Memorandum Opinion and Order, Judge Ann D. Montgomery).

Qwest argued that under its Minnesota tariff MDS and MDSI are identified as basic service elements (BSEs) and are provided at the rates and charges and under the terms and conditions delineated in the tariff or price list. They are offered pursuant to tariffs approved by the Commission. They are not included in the definition of UNEs and are not included in the pricing references of the ICA.

### **C. Position of the DOC**

The DOC agreed with the ALJ that the terms of the ICA require Qwest to provision these as UNEs as requested by Desktop.

The DOC argued that Desktop was not seeking voicemail in the present case. Rather, it argued that Desktop has its own voicemail equipment and was only seeking access to the discrete network elements—switch ports and transport—that were required for Desktop to provide appropriate signaling to its local service customers being served by UNE loops leased by Desktop from Qwest.

Further, the DOC argued that because Desktop was not seeking voice mail, Qwest’s argument that a federal court holding that voice mail was an information service, not a telecommunications service, and therefore not subject to the wholesale discount requirements of the Federal Telecommunications Act of 1996, was irrelevant.

The DOC supports Desktop’s position that the ¶ 52 of the ALJ’s report be clarified to indicate that the switch features of MDS as well as the switch features of MDSI must be available as UNEs under the ICA (see Desktop’s position, below).

Further, the DOC stated that the ALJ in his Conclusions of Law ¶ 6 referred to the product at issue as “SDMI,” which the DOC argued was a typographical mistake that created confusion. It stated that the generic trade name for the bundled product was SMDI or SMDI-E (Qwest referred to the bundled product as MDS or MDSI). The DOC recommended that in order to distinguish between the over-all product called SMDI (or MDS by Qwest) and the switch port and transport elements that make up the product, ¶6 of the Conclusions of Law should be changed so that “the elements that make up MDS or MDSI” replaces the “SDMI” reference. ¶ 6 of the Conclusions of Law would then read as follows:

Qwest had an obligation under the ICA to provide ~~SDMI~~ the elements that make up MDS or MDSI to Desktop as a UNE. Qwest failed to provide ~~SDMI~~ the elements that make up MDS or MDSI as an unbundled element when first requested by Desktop. Qwest has an ongoing obligation to provide switch features as UNEs, where such features are installed. Switch features are not removed from Qwest’s unbundling obligation when such features are part of Qwest’s tariffed MDS or MDSI products.

Also, the DOC recommended that Recommendation ¶ 4 of the ALJ's Report should add "and transport elements" so that the Recommendation would read as follows:

Requiring that Qwest provide simple message device indicator ports and transport elements as a UNE in accordance with the parties' interconnection agreement.

The DOC argued that without this clarification there could be confusion at a later date as to the intention of the ALJ. The DOC indicated that the ALJ's Report is clear that the transport element as well as the switch port features must be available as UNEs.

#### **D. Position of Desktop**

Desktop is in agreement with the ALJ that Qwest is required to provide SMDI and SMDI-Enhanced as UNEs. It argued that Qwest's offering a particular functionality as a tariffed product did not preclude that same functionality from being a UNE under an ICA.

Desktop requested that the Commission modify ¶ 52 of the ALJ's Report to clarify that both the MDSI switch port and the MDS switch port should be provided as a UNE. Desktop argued that such an interpretation was consistent with the rest of the ALJ's recommendation and with the record. It argued that there is no basis for distinguishing, for purposes of the ICA, between the switch ports used to provide MDS and the switch ports used to provide MDSI. If the port used to provide MDSI is a UNE under the ICA, the port used to provide MDS should be a UNE under the ICA as well. It recommended that ¶ 52 be modified to read as follows:

The switch features of MDSI and MDS are available as UNEs under the terms of the ICA. Provision of these switch features is only required where the features are installed. The dedicated and common transport portions of MDS and MDSI (where provided) must be paid for by the CLEC under the terms of the ICA.

#### **E. Commission Action Regarding Simple Message Device Interface Access**

The Commission concurs with the ALJ on this issue and will adopt the ALJ's report with respect to this issue, with the modifications to ¶ 6 of the ALJ's Conclusions of Law and ¶ 4 of the ALJ's Recommendations, as proposed by the DOC; and the modification to ¶ 52 of the ALJ's Findings of Fact, as proposed by Desktop.

The Commission finds that the ALJ's conclusion that Desktop is not seeking voice mail from Qwest is sound. It is clear that Desktop has its own voice mail equipment. The Commission agrees that Desktop is seeking access to discrete network elements—switch ports and transport—that are required to provide the appropriate signaling.

The Commission concurs in the ALJ's finding that MDS and MDSI (as configured by Qwest) are combinations of switch features and transport. These elements make up the SMDI/MDS products and are "features, functions and capabilities" of the switch, as set forth in the ICA definition of local switching. As such, they are treated as UNEs in the ICA and should be priced as UNEs.

The Commission also agrees that it is clear that Qwest has no obligation to upgrade its network to afford a CLEC a switch feature that is not currently installed.

Finally, in the event of a request for reconsideration on this issue, the Commission will direct that the parties address the impact, if any, of the decision in *US West Communications, Inc. v. MPUC, et al*<sup>8</sup> on the Commission's decision herein. This issue was brought up at hearing, and all parties did not have an opportunity to consider the matter.

## **VI. Provisioning of Dark Fiber**

### **A. The ALJ's Findings and Conclusions**

The ALJ found that Qwest had an obligation under the ICA to provision dark fiber in a reasonable manner to Desktop and that Qwest failed to do so. Specifically, the ALJ found that Qwest was required to reserve and provision the dark fiber, requested by Desktop, between Qwest's central offices at Red Wing and Winona.

The ALJ also found that between the Red Wing and Winona central offices there is a local access and transport area (LATA) boundary. As a regional bell operating company, Qwest was required to limit its business regarding the provision of telecommunications services to within a LATA.<sup>9</sup>

The ALJ concluded that because the order for dark fiber that Qwest failed to process crossed a LATA boundary, the *force majeure* provision of the ICA relieved Qwest from its obligation to provide the ordered dark fiber on this route. The ALJ recommended that the Commission deny Desktop's complaint regarding Qwest's failure to provision dark fiber under the ICA.

### **B. Position of Qwest**

Qwest argued that it had no obligation to take any action on Desktop's order because the reservation lasted only 90 days (pursuant to the ICA) and the 90 days had expired. Further, the reservation crossed a LATA boundary.

### **C. Position of the DOC**

The DOC argued that the ICA requires reasonableness and cooperation on the part of Qwest. It agrees with Desktop that even if Qwest was not required to provide the interLATA dark fiber segment, it should have provisioned those segments that were available.

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<sup>8</sup> Id.

<sup>9</sup> 47 U.S.C. § 271(a).

The DOC argued that Qwest was required under the ICA to reserve dark fiber upon a CLEC's inquiry. It was not the CLEC's obligation to reserve the fiber by checking a box on a Qwest-created form. The DOC agreed with the ALJ that the reservation form used by Qwest was contrary to the negotiated terms of the ICA.

#### **D. Position of Desktop**

Desktop argued that Qwest breached the ICA by failing to make fiber available to Desktop as required under the ICA. Further, although the ALJ found that breach excused by the federal prohibition on Qwest providing interLATA services before it received approval to provide service that crosses the LATA boundaries (271 approval), Desktop argued that since Qwest now has 271 approval, there is no basis for Qwest to continue to refuse to provide the fiber.

Desktop also argued that had Qwest disclosed, in a timely manner, that it was unable to provide a segment of the requested route because it crossed a LATA boundary, Desktop could have explored alternative means of carrying traffic across the boundary. Further, Qwest had no excuse for not providing the other segments on the route that do not cross a LATA boundary.

Desktop argued that it should be permitted to recover monetary compensation for Qwest's failure to comply with the ICA requirements regarding the provisioning of dark fiber.

#### **E. Commission Action on the Provisioning of Dark Fiber**

The Commission agrees with and adopts the ALJ's report in entirety with respect to this issue and will deny Desktop's complaint regarding Qwest's failure to provide dark fiber.

The ALJ determined that Qwest was unable to provide the dark fiber across a LATA boundary because of the *force majeure* provision in the ICA. The Commission agrees. Qwest was legally prohibited from provisioning the requested dark fiber. For this reason, the Commission will not remand this issue for the calculation of damages or remedies.

### **VII. DMOQ Credits and Other Remedies**

#### **A. The ALJ's Findings, Conclusions and Recommendations**

The ALJ recommended that the Commission deny Desktop's request for DMOQ credits under the ICA for Qwest's preordering noncompliance in regards to UBS. This was based on the ALJ's finding that the ICA<sup>10</sup> was very specific as to what DMOQ applied, what failure triggered a credit and what credit should be imposed for the failure. The ALJ found that none of the DMOQs in the ICA were implicated in Desktop's complaint, that all of Qwest's noncompliance fell under the category of preordering, and that DMOQs were not listed in that category in the ICA.

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<sup>10</sup> Appendix A of Attachment 11 to the ICA.

However, the ALJ also found that the Commission has the authority to award penalties for noncompliance with the ICA pursuant to the ICA and also under Minn. Stat. § 237.462, Subd. 1.

The ALJ found that Desktop demonstrated that Qwest violated the ICA and that Desktop has suffered some amount of damages as a result of those violations. However, because Desktop relied upon DMOQs for the damage assessment in this matter, Desktop did not present evidence in the contested case proceeding upon which a damage award could be made. The ALJ determined that to deny Desktop the opportunity to demonstrate its damages would provide a windfall to Qwest and reward ICA violations. For these reasons, the ALJ recommended remanding the matter for proceedings on damages.

Specifically, the ALJ recommended that this matter be remanded for further proceedings to determine damages suffered by Desktop for Qwest's failure to comply with the ICA regarding UBS and customer migration and for the assessment of an appropriate penalty under Minn. Stat. § 237.462.

### **B. Qwest's Position**

Qwest was in agreement with the ALJ's finding that the ICA does not provide for DMOQs applicable to the pre-order process.

Qwest took exception to the ALJ's determination that the hearing should be reopened so that Desktop may offer evidence that it is entitled to compensatory damages. Qwest also took exception to the ALJ's finding that the Commission has the authority to reopen the proceedings and award penalties under Minn. Stat. § 237.462, Subd. 1 and under the terms of the ICA. Qwest argued that neither the ICA nor the statute gave the Commission the authority to grant damages to a CLEC who believed it had been damaged by a violation of an ICA.

Further, Qwest argued that the Commission has no authority to reopen a procedure that has been closed. It argued that to do so would not only be unauthorized, but would unfairly give Desktop a second chance to prove its case.

Qwest also argued that Desktop asserted during the hearing that it was entitled to DMOQs for Qwest's delay in providing UBS. Even after Qwest argued that the ICA does not provide DMOQs for the pre-order process, Desktop chose not to present any evidence of any actual damages it sustained as a result of the alleged violations by Qwest.

Finally, Qwest disagreed with Desktop's and the DOC's argument that DMOQs relating to Operations/Systems Readiness Testing were available under the ICA. Qwest argued that there was no justification for DMOQs under this theory.

### **C. DOC's Position**

The DOC agreed with the ALJ that this matter should be remanded for further proceedings to determine the amount of damages and the appropriate monetary penalties. The DOC argued that the Commission may enforce ICA provisions, including provisions on compensation and damages.

The DOC recommended that the focus of the remand proceedings be on establishing the damages available to Desktop under the ICA rather than the amount of penalties under Minn. Stat. § 237.462. Desktop should be given the opportunity to seek recovery of damages under any measure of damages consistent with the ICA.

The DOC also disagreed with the ALJ's Report finding that "none of the DMOQ's in Appendix A are implicated in Desktop's complaint." The DOC argued that the ICA provides a DMOQ measure of damages for the failure of Qwest to test its systems so that Qwest could accept UBS orders. The DOC stated that the operations/systems readiness DMOQ, which is separate from the preordering DMOQ, was not addressed by the ALJ and may be applicable. Because of this the DOC recommended that ¶68 of the ALJ's Findings be modified to eliminate the last two sentences that read as follows:

...None of the DMOQs in Appendix A are implicated in Desktop's complaint. All of Qwest's demonstrated noncompliance falls in the category of preordering and DMOQs are not listed in the ICA in that category.

#### **D. Position of Desktop**

Desktop took exception to the ALJ's conclusion that per-occurrence credits under the ICA were not available in this case. It argued that for UNEs that were not specific to an individual customer, such as UBS, Qwest was liable for a credit of \$2,500 per day, plus waiver of applicable installation charges, for each service order provisioning commitment missed. Desktop maintained that Qwest's ability to accept orders for UBS was properly considered a "service order provisioning commitment" for purposes of the DMOQ commitment.

Desktop also argued that to assure that Qwest's systems would be ready to accommodate CLEC orders for UNEs, the ICA contained per-occurrence credit provisions relating to "Operations/Systems Readiness Testing." It argued that Qwest was required to complete testing of systems between Qwest and Desktop at least 90 days prior to commencing the provisioning of local service. Pursuant to this provision, Desktop argued that Qwest was liable for per-occurrence credit in the amount of \$2,500 for each week or partial week of delay.

However, Desktop argued, if the Commission determines that per-occurrence credits do not apply, it would be appropriate to remand the matter for evidence regarding the appropriate amount of compensation.

#### **E. Commission Action regarding DMOQs and Other Remedies**

The Commission will adopt the ALJ's report in its entirety with respect to this issue, with the modifications to ¶ 68 recommended by the DOC.

The Commission finds the findings and conclusions of the ALJ well reasoned and supported in the record. The Commission accepts the ALJ's recommendation to remand this matter to the Office of Administrative Hearings for further proceedings to determine damages suffered by Desktop through Qwest's failure to comply with the ICA's unbundled switching provisions and Qwest's discrimination in customer migration, for the assessment of an appropriate penalty under Minn. Stat. § 237.462. However, the Commission modifies the ALJ Report, as necessary, to clarify that the remand for further proceedings includes consideration of the issue of whether Desktop qualifies for DMOQ credits under the ICA's "systems readiness" provisions as well as the calculation of penalties under Minn. Stat. § 237.462.

The ALJ found that Qwest violated the ICA and that Desktop suffered some amount of damages as a result of Qwest's violations, but that there was no factual basis in the record to determine what monetary penalties were appropriate. The Commission agrees and finds that, under these circumstances, it would be unfair not to address the issue of damages. To do otherwise would not give appropriate recognition to the ICA nor to the Commission's goal of promoting competition.

Further, the ALJ recommended denying Desktops request for DMOQ credits for violations concerning UBS. This was based on the ALJ's determination that Qwest's noncompliance fell into the category of "preordering," for which the ALJ found there were no DMOQs in the ICA in that category. Whether there were DMOQs for "systems readiness" was not addressed by the ALJ. The Commission is persuaded that the issue of whether Qwest's actions regarding UBS may fall under the category of "systems readiness" and whether DMOQs apply should be addressed in the remanded hearing. This matter was not addressed in the earlier hearing and requires further factual development.

Finally, the Commission will remand the issue of damages to the ALJ for further hearings but clarifies that, in doing so, the Commission has no pre-conceived expectation that damages are warranted for each of the issues to be addressed.

### **ORDER**

1. The Commission accepts, adopts, and incorporates herein the Findings of Fact, Conclusions of Law, and Recommendations of the Administrative Law Judge as set forth below:
  - A. On the issue of unbundled switching:
    1. The Commission adopts the ALJ's Report in its entirety with respect to this issue, except as it relates to DMOQs, and with the modifications to ¶ 24 as set forth in Section IIIC, herein. The Commission specifically finds that Qwest willfully violated the terms of the ICA,



2. Qwest shall comply with the ICA to make ordering information for UBS available to CLECs on a timely basis.
- B. On the issue of customer migration:
1. The Commission adopts the ALJ's Report in its entirety with respect to this issue.
  2. Qwest is prohibited from discriminating against Desktop and CLECs in the handling of customer migration where Qwest's records show a relationship with a volume internet service provider.
  3. Qwest shall submit a compliance filing within 30 days of this Order indicating how it has modified its practices to eliminate the basis of Desktop's complaint with respect to this issue.
- C. On the issue of providing message device interface access:
1. The Commission adopts the ALJ's Report in its entirety with respect to this issue with the modifications set forth in Section V, herein, to ¶ 6 of the Conclusions of Law, ¶ 4 of the Recommendations, and to ¶ 52 of the Findings of Fact.
  2. Qwest shall provide simple message device indicator ports and transport elements as a UNE, in accordance with the ICA.
  3. In the event reconsideration is requested on this issue, the parties shall address the impact of the decision in *US West Communications Inc. v. MPUC et. al* on this matter.
- D. On the issue of provisioning dark fiber:
1. The Commission adopts the ALJ's Report in entirety with respect to this issue including denying Desktop's complaint regarding Qwest's failure to provision dark fiber under the parties ICA.
- E. On the issue of DMOQ credits and other damages:
1. The Commission adopts the ALJ's Report in its entirety with respect to this issue with the following modifications and clarification:
    - a. ¶ 68 of the Findings of Fact is modified as set forth in Section VII herein;

- b. The ALJ's Report is modified as necessary to clarify that the remand includes requesting the ALJ to consider and make a recommendation on the application of the ICA's "systems readiness" DMOQs or other provisions of the ICA, as well as the calculation of penalties under Minn. Stat. § 237.462.

- 2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

(S E A L)

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